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Decision

Matter of: McGregor Manufacturing Corporation

File: B-285341

Date: August 18, 2000

William H. Carroll, Esq., Dykema Gossett, for the protester.
Vera Meza, Esq., and Wade Brown, Esq., U.S. Army Materiel Command, for the agency.

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DIGEST

The Army reasonably restricted urgent purchase of deswirl ducts—an engine part deployed on helicopters to help prevent heat-seeking missiles from locking on, tracking, and destroying the helicopters while they hover—to the awardee, the original equipment manufacturer, and excluded the protester from competing, where the record establishes an urgent need for the item because the agency had very few of the parts in stock, a large number of the parts were back-ordered, and a number of helicopters for which the part were ordered were not able to perform their missions. Though the protester had been awarded a contract to produce the item more than 3 years earlier, the protester had experienced many performance delays and had not successfully produced even one usable item for the agency by the time the urgent buy was initiated.

DECISION

McGregor Manufacturing Corporation (McGregor) protests the United States Army Aviation & Missile Command's (AMCOM) issuance of a delivery order to General Electric Company (GE) for deswirl ducts.¹ The protester contends that the Army unreasonably determined that it had an urgent need for deswirl ducts and, therefore, improperly acquired them from GE on a sole-source basis without allowing McGregor to compete for the contract.

¹ The delivery order (No. BS72) was issued against a basic ordering agreement between GE and the Air Force.

We deny the protest.

A deswirl duct is a component of the Hover Infra Red Suppressor System, which is deployed on the UH-60 Blackhawk helicopter. The system recirculates hot exhaust gases, mixing them with cooler ambient air, before releasing the exhaust gases into the atmosphere at a cooler temperature. The system reduces the ability of heat-seeking missiles to lock on, track, and destroy the helicopter while it is hovering. Contracting Officer's Statement at 1 n.1. Before 1996, the only approved sources for deswirl ducts were GE (the original equipment manufacturer) and Sikorsky Aircraft Corporation (the prime contractor for the UH-60 helicopter), and all of the Army's purchases of deswirl ducts were either from Sikorsky, with GE as a subcontractor, or from GE directly. However, there never was any real competition to supply the Army with deswirl ducts because Sikorsky never competed with GE. Contracting Officer's Statement at 2. In 1996, McGregor submitted a source approval package for this part to the Army and became an approved source.

The Army explained that, shortly thereafter, believing that the technical data package (TDP) was adequate to allow McGregor to produce deswirl ducts, the Army conducted its first competitive procurement for deswirl ducts. Hearing Transcript (Tr.) at 51-53.² Sikorsky declined to compete, and only GE and McGregor submitted proposals. Although GE's price was lower than McGregor's, GE's proposal was nonresponsive to the required delivery schedule. Agency Report, Tab 10, Price Negotiation Memorandum, at 1-2. Thus, in August 1996, the Army awarded its first contract to McGregor (contract No. DAAJ09-96-C-0319, hereinafter referred to as contract 0319) for 343 deswirl ducts. Contracting Officer's Statement at 1-2. McGregor and the Army experienced numerous delays under contract 0319 that prevented McGregor from manufacturing acceptable deswirl ducts in accord with the original contract schedule. See generally Contracting Officer's Statement at 2-10; Protester's Comments at 5-22. We briefly describe below several instances that are both significant and illustrative of the numerous delays incurred.

Some of the delay resulted from alleged deficiencies in the TDP that McGregor informed AMCOM it had discovered shortly after contract award and which McGregor asserted required resolution before McGregor could begin to manufacture the first article unit. For example, the TDP was missing a "mylar" template--a full-scale plastic template, similar to a sewing pattern, used to manufacture deswirl ducts. Contracting Officer's Statement at 2-3; Agency Additional Statement, June 28, 2000, at 1. Since AMCOM did not have the mylar template and Army engineers were unable to obtain it from Sikorsky, the Army gave McGregor a sample of the part for which the mylar template was used, and McGregor used reverse-engineering to create the mylar template. Contracting Officer's Statement at 3.

² The transcript citations in this decision refer to the transcript of the hearing conducted by our Office in connection with this protest.

Yet another delay arose out of a dispute regarding McGregor's decision to use an automated welding process to manufacture the deswirl ducts. Apparently, the Defense Contract Management Command's quality assurance representative insisted that McGregor had to weld the production units manually, because McGregor's first article had been manually welded. After much discussion and considerable delay, the agency agreed to automated welding, contingent upon McGregor's first production unit using automated welding passing a second fit verification test; several additional months passed before the fit test was successfully completed. Contracting Officer's Statement at 4-5; Protester's Comments at 5-7.

Because of the numerous delays, McGregor proposed and the Army agreed to a revised delivery schedule under which the Army would begin receiving deswirl ducts by May 30, 1998--more than 1 year after the originally-scheduled initial delivery date and a year and 9 months after McGregor had been awarded its first contract. Contracting Officer's Statement at 5.

The agency explains that, during this time period, the Army's supply of deswirl ducts was depleted and a large quantity of backorders had accumulated, creating the potential for serious impact on the operational capability of units that rely on the UH-60 Blackhawk helicopter. Thus, in May 1998, the Army determined that it had an urgent need for 100 deswirl ducts. Contracting Officer's Statement at 5-6. Shortly after the urgency determination was made, McGregor informed the Army that one of its subcontractors for contract 0319 had experienced a "tragic" fire that destroyed 90 percent of its manufacturing equipment and 80 percent of its plant. McGregor also informed the Army that while its May and June deliveries would not be affected, it would have to renegotiate the balance of its delivery schedule with the Army. Contracting Officer's Statement at 6; Agency Report, Tab 48, Letter from McGregor to AMCOM 1 (May 22, 1998); Letter from McGregor to AMCOM 1 (June 5, 1998).

In late June 1998, because of the ever-increasing backlog of requisitions for deswirl ducts as well as uncertainty regarding McGregor's contract 0319, the Army awarded a sole-source contract to GE for 100 deswirl ducts on an urgency basis. Contracting Officer's Statement at 6; Agency Report, Tab 49, Determination and Findings and Approval for Use of an Unfinalized Contract Action, at 1. When McGregor learned of the award to GE, it filed a protest with our Office (reference No. B-281210) alleging that the sole-source award to GE was improper.

In December 1998, the Army agreed to a revised (*i.e.*, delayed) delivery schedule as proposed by McGregor for its original contract. On February 18, 1999, in order to settle McGregor's protest of the sole-source contract awarded to GE, the Army awarded McGregor a second contract (contract No. DAAH23-99-C-0030, hereinafter referred to as contract 0030) for an equal quantity (*i.e.*, 100 units) of deswirl ducts. Contracting Officer's Statement at 7; Agency Report, Tab 2, Legal Memorandum, at 7-8.

In April 1999, the Army discovered that the TDP that it had provided to McGregor, and which McGregor had used to manufacture the deswirl ducts, did not contain the most recent revision (called revision K) to a GE drawing. Revision K required that a reinforcing bracket (called a “doubler”) be attached to the fins or vanes of the deswirl ducts to prevent breakage during engine operation. Contracting Officer’s Statement at 7. During the hearing, the Army explained that it had supplied some of the McGregor-manufactured deswirl ducts to the Navy and, in late February 1999, the Navy notified Army engineers that there was a problem with the McGregor-manufactured parts. Even though McGregor had manufactured the deswirl ducts to the specifications contained in the TDP, the vanes of the deswirl ducts were being damaged, or were separating from the rest of the part, and, in some instances, were shooting out of the aircraft with the exhaust. The Navy informed the Army that, because of concern over the safety of flag crews working near the aircraft, the Navy was planning to ground its aircraft. Tr. at 137-41. The Army, therefore, issued a stop work order to McGregor on both of its contracts until the Army could update the TDP in accordance with revision K.³

Because of incorporation of revision K into the TDP, and in order to resolve the problems with the vanes, the Army and McGregor discussed how best to rework, rather than scrap, deswirl ducts that had already been produced. McGregor suggested several remedies, which Army engineers evaluated. Eventually, it was agreed that McGregor would add the doublers to each unit and then repeat the brazing cycle when necessary.⁴ McGregor also proposed several configuration changes to conform reworked parts to revision K, requested a new first article test, and stated that it would have to purchase new tooling and that it would submit a claim for an equitable adjustment for the additional work required of it. Discussions and clarifications were held regarding the proposed configuration changes. The Army approved the request for a new first article test and new tooling (contingent upon Army approval of that tooling). These actions, and others, required that the Army and McGregor negotiate revised delivery schedules, equitable adjustments, and new prices. In all, more than a year passed between the discovery that the TDP was missing revision K and modification of the contract to reflect resolution of all issues.⁵

³ In January 2000, the Army discovered that yet another revision had to be incorporated into the deswirl duct TDP. Contracting Officer’s Statement at 10. The Army explained during the hearing that this revision affected identification of the part but did not affect form, fit, or function. Tr. at 129.

⁴ According to the Army, “brazing” is a method of joining two pieces of metal using heat and a third piece of metal; it is similar to soldering. Tr. at 121-22.

⁵ Contract modifications formally resolving these and other issues were issued on both of McGregor’s contracts in May 2000. Contracting Officer’s Statement at 10; Tr. 63. The revised delivery schedule required McGregor to begin making deliveries (continued...)

On February 4, 2000, prior to resolution of the above issues on McGregor's two contracts, the contracting officer executed a justification and approval (J&A) for purchasing 273 deswirl ducts from GE on a sole-source basis, citing the unusual and compelling urgency of the requirement. The J&A stated that Sikorsky would not compete for this requirement, that McGregor was still under a stop work order on both of its prior contracts, and that McGregor still owed the Army 323 deswirl ducts under its prior contracts.⁶ Agency Report, Tab 95, J&A for Other Than Full and Open Competition, at 1-2.

A cognizant Army item manager stated that the deswirl duct is a non-reparable item--if the part becomes unserviceable, it is thrown away and a replacement part ordered. The item manager also stated that the Army's requirements objective for this part--representing the number the Army needs to have on hand or due in at any point in time to cover a funded war reserve requirement--was 600 units. Tr. at 12. The item manager testified that the Army had always planned on conducting "normal replenishment buys" for deswirl ducts, but such buys were predicated on getting deliveries from McGregor under its contracts; the item manager also testified that what made the replenishment actions urgent was not getting deliveries as anticipated. Tr. at 68-69. The contracting officer who had administered both of McGregor's contracts testified that the Army was trying to get the TDP deficiencies and everything else resolved "so we could have a viable competition between McGregor and GE." Tr. at 69-70.

The J&A for the delivery order stated that the agency had only 34 units on hand with 229 due out and that 25 of the requisitions were NMCS (not mission capable status) backorders.⁷ The J&A stated:

Failure to immediately award the contract will have an adverse effect on operational capability on the MH-60K, Special Operations Aircraft, EH-60A and UH-60L. . . . Furthermore, the grounding of the UH-60Ls and MK-60Ks compromise the mission of units in Bosnia, Korea, and

(...continued)

anew on June 30, 2000, when 15 units were to be delivered. Agency Report, Tab 79, Contract Modification No. P00008, at 2.

⁶ On February 3, Sikorsky informed the Army that it would not compete for the emergency buy. Contracting Officer's Statement at 15.

⁷ As used here, "not mission capable status" means that the systems and equipment are not capable of performing any of their assigned missions due to a supply shortage. Contracting Officer's Statement at 11 n.9.

Saudi Arabia, as well as the mission of US Customs, and the Drug Enforcement Agency (DEA).

Agency Report, Tab 95, J&A, at 1.

Accordingly, the Army issued a delivery order to GE for 273 deswirl ducts on March 24. Agency Report, Tab 4, Delivery Order No. BS72. The Army notified McGregor of the award to GE, and this protest was filed shortly thereafter.

The protester contends that the issuance of delivery order No. BS72 to GE on a sole-source basis violates statutory requirements for competition.⁸ McGregor states that the Army knew as early as October 28, 1998, when the Army asked our Office to dismiss McGregor's previous protest, that it had a need for a large quantity of deswirl ducts, and therefore asserts that the Army has no credible basis to assert urgency as the justification for its sole-source award in March 2000 or for its failure to issue a pre-award CBD notice of its intent to make that award. Protest at 1, 5-6.

Under the Competition in Contracting Act of 1984 (CICA), an agency may use noncompetitive procedures to procure goods or services where the agency's needs are of such an unusual and compelling urgency that the government would be seriously injured if the agency is not permitted to limit the number of sources from which it solicits bids or proposals. 10 U.S.C. § 2304(c)(2) (1994); Federal Acquisition Regulation (FAR) § 6.302-2(a)(2). While CICA requires that the agency request offers from as many sources as practicable under the circumstances, 10 U.S.C. § 2304(e), FAR § 6.302-2(c)(2), an agency may still limit the procurement to the only firm it reasonably believes can properly perform the work in the available time. Hercules Aerospace Co., B-254677, Jan. 10, 1994, 94-1 CPD ¶ 7 at 3. We will object to the

⁸ McGregor asserts that the Army's failure to conduct a competitive procurement and solicit an offer from it was inconsistent with its understanding at the time it withdrew its prior protest (reference No. B-281210), and McGregor requests its prior protest be reinstated. Protest at 1-3, 8. When McGregor withdrew the prior protest, McGregor stated that the Army agreed to award McGregor a contract for the same number of deswirl ducts as had been awarded to GE (*i.e.*, 100 units) under the protested contract and that the withdrawal was "subject to reinstatement should the Army not consummate the planned award." The withdrawal letter did not mention any agreement under which the Army would immediately issue a competitive solicitation for deswirl ducts. Letter from McGregor to GAO 1 (Nov. 6, 1998). As noted above, the Army awarded McGregor a contract for 100 deswirl ducts on February 18, 1999. Agency Report, Tab 59, McGregor Contract No. 0030. In any event, the record shows that the Army issued a competitive solicitation for 254 deswirl ducts April 26, 2000, and provided McGregor with a copy of that solicitation. Agency Report, Tab 110, Contract Specialist Memorandum for Record 1 (June 5, 2000); Solicitation No. DAAH23-00-R-0145 amend. 1, at 1, 3.

agency's determination only where the decision lacks a reasonable basis. See Equa Indus., Inc., B-257197, Sept. 6, 1994, 94-2 CPD ¶ 96 at 2-3. In this regard, a military agency's assertion that there is a critical need related to human safety and which impacts military operations carries considerable weight. Id. at 3; see also BlueStar Battery Sys. Corp., B-270111.2, B-270111.3, Feb. 12, 1996, 96-1 CPD ¶ 67 at 3. Here, the Army reasonably determined that it had an urgent need for 273 deswirl ducts and reasonably limited the procurement to GE, the only firm the Army believed could fulfill the requirement within the available time.

McGregor challenges the quantity being purchased under the delivery order to GE. The Army explained that the determination of how many units were urgently needed was a projection which took into account several different factors. Tr. at 20-22, 28. The item manager explained that the urgency quantity basically was calculated by adding the existing back orders and the additional orders that the Army anticipated it would receive before GE would begin delivering under the delivery order, and subtracting from that total the number of units that were in stock and which were due from McGregor under its two contracts over the same period. Tr. at 16-31, 36-37. Using this methodology, the item manager calculated that by the time GE would begin making deliveries under delivery order BS72, the Army would be in a "negative asset posture" equal to 273 units, even after taking into consideration McGregor's scheduled deliveries under its contracts. Tr. 19-20. Based on the record, we have no basis for questioning the agency's method of determining the quantity or the quantity itself that was urgently needed.

Regarding the challenge to the urgency of the agency's requirements, we have no basis to question the urgency determination. As described above, the record reflects that, as of the time of the sole-source award to GE, a number of helicopters could not be used to perform their missions because they did not have working deswirl ducts; a very large number of deswirl ducts had already been requisitioned and were back-ordered; and the grounding of helicopters because of the need for working deswirl ducts would compromise the missions of the Army, Customs, and DEA. Moreover, the record shows that the agency's urgent need for this item was caused in large part because, even though McGregor had been awarded its first contract more than 3 years earlier, McGregor still had not delivered any usable deswirl ducts to the Army. Contracting Officer's Statement at 11; Tr. 68-69.

The decision not to solicit McGregor was reasonable in the circumstances. We recognize that McGregor's inability to provide suitable deswirl ducts was caused in part by deficiencies in the TDP that the Army supplied to the firm--in, particular the failure to include revision K to the GE drawing. However, an Army engineer testified that the drawing was GE's and, since the Army did not have a data contract with GE,

GE was not contractually obligated to supply the Army with the latest revisions. Tr. 84. The Army also testified that it did not learn that there was a revision K to the GE drawing until early in 1999, when the Navy notified the Army's engineers that the deswirl ducts that had been manufactured by McGregor were breaking apart and shooting out of the helicopters in the exhaust. Tr. 137-41. In addition, many other delays (some of which are discussed above) occurred under McGregor's first contract (for example, the fire at the supplier's plant) that also contributed to the agency's not receiving any usable deswirl ducts from the firm.

McGregor argues that virtually all of the performance delays under its contracts were either excusable delays or were primarily attributable to dilatory responses by the Army to McGregor's requests for clarifications and deviations or other unforeseen events. However, whether the many delays experienced by McGregor were excusable or not is a matter of contract administration and is not relevant to our resolution of the protest. See Equa Indus., Inc., supra, at 5-7. What is relevant is the fact that there were many delays over a long period of time under the contracts with McGregor; that McGregor had not delivered a single usable deswirl duct to the Army at the time the decision was made to procure these critically needed parts from GE; and that the most recent, revised delivery schedule would only require McGregor to begin delivering its first 15 units at the end of June 2000. Contracting Officer's Statement at 11, Tr. 26-27, 62-63. Without attributing fault for the numerous delays to either party, it is clear from the record that the reason that the parts were urgently needed was because of the inability of the agency to obtain usable deswirl ducts from McGregor.⁹ In these circumstances, the Army reasonably restricted the

⁹ From the record, we think it is fair to say that both McGregor and the Army contributed to the delays in obtaining performance from McGregor and that also, in some cases, such as the subcontractor fire, the delay was caused by events that were beyond the control of both parties; the current urgent need for the deswirl ducts did not result from lack of advance planning.

procurement to GE--the only approved source that had successfully produced usable deswirl ducts to the most recent drawing revisions in the past and the only firm that the Army reasonably believed could deliver sufficient quantities of usable deswirl ducts within the required timeframe--while continuing to work with McGregor in order to have it produce usable deswirl ducts under its outstanding contracts.¹⁰

The protest is denied.

Robert P. Murphy
General Counsel

¹⁰ In its comments on the agency's protest report, McGregor raised a supplemental protest issue--i.e., that the Army's decision to exclude McGregor from competing for the purchase of the urgent quantity amounted to a determination of McGregor's nonresponsibility that should have been referred to the Small Business Administration for a certificate of competency--which we dismissed as untimely on June 23, 2000. McGregor has asked for reconsideration. As we stated in our dismissal, McGregor knew all the information that it needed to protest this issue at the time it filed its initial protest and, therefore, the issue was properly dismissed. In any event, we have held that, where a contracting agency decides to satisfy an urgent requirement by limiting competition to firms it believes can perform satisfactorily, and thereby excludes a small business concern from the competition, the agency need not refer the decision to exclude the small business to the SBA. See DOD Contracts, Inc., B-250603.2, Mar. 3, 1993, 93-1 CPD ¶ 195 at 4. In light of our decision here that the agency had a reasonable basis for its decision to sole source this requirement, no referral to the SBA was required.